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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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WILEY BENNETT, ALEJANDRO DIAZ, COREY BROWN, CLEVELAND GOODEN, ANDRE HOLLEY, ANTHONY FIELDS, JOSEPH AFFLIC, JOSE BURGOS, MICHAEL CARABALLO, MICHAEL WILLIAMS, RAYNALDO COLON, REMINGTON WATSON, LINSTER RICKS, SHELDON KILLEBREW, JAIME MACK, and LIONEL HUDSON,

Plaintiffs,

-against-

THE CITY OF NEW YORK, a municipal corporation; MARTIN HORN, Commissioner of the New York City Department of Correction ("DOC"); ROBERT SHAW, Warden at North Infirmary Command ("NIC"); NADINE FELTON, Warden at NIC; JACQUELINE THOMAS-ANDREWS, Warden at NIC; FIDEL GONZALEZ, Warden at NIC; "FNU" ANDREWS, Deputy Warden at NIC; FNU GILL, Deputy Warden at NIC; "FNU" O'Connor, Deputy Warden at NIC; ERIK BERLINER, DOC Asst. Commissioner for Health Affairs; MICHELLE BACON, DOC Asst. Commissioner for Health Affairs; PATRICIA GORDON, DOC Disability Rights Coordinator; NINA EDWARDS, DOC Disability Rights Coordinator; JAMES CAPOZIELLO, Assistant Commissioner for Heath Care Access, Department of Health and Mental Hygiene ("DOHMH"); LOUISE COHEN, Assistant Commissioner for Health Care Access DOHMH; BRUCE DAVID, Assistant Commissioner for Health Care Access DOHMH; ARTHUR GUALTIERI, Assistant Commissioner for Health Care Access DOHMH,

Defendants.

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**STIPULATION AND ORDER OF SETTLEMENT AND DISCONTINUANCE**

07-CV-2823(RPP)

**WHEREAS,** plaintiffs commenced this action, by Complaint dated March 10, 2008 ("Complaint")[1], on their own behalf and on behalf of all others similarly situated, alleging, inter alia, that defendants violated plaintiffs' rights as guaranteed by federal and State law;

**WHEREAS,** the defendants deny plaintiffs' allegations;

**WHEREAS,** the parties desire to settle this action on terms and conditions just and fair to all parties;

**WHEREAS,** the commitments set forth in this stipulation are narrowly drawn, extend no further than necessary to correct the alleged violations of the federal rights at issue, and are the least intrusive means necessary to correct the alleged violations of those federal rights;

**WHEREAS,** for every inmate housed at Rikers Island North Infirmary Command ("NIC") Dorm 3, the New York City Department of Health and Mental Hygiene ("DOHMH") first considers whether infirmary care is needed. If DOHMH determines that an inmate needs infirmary level care, he is not housed in Dorm 3, but rather is housed in Dorm 1 or Dorm 2 or transported to a hospital;

**WHEREAS,** in the Complaint plaintiffs have sought only injunctive relief on behalf of the class and have sought only damages on behalf of the individually named plaintiffs but have not sought any damages on behalf of the class; and

**WHEREAS,** this stipulation resolves only plaintiffs' claims for injunctive relief against defendants, with the individually named plaintiffs' claims for damages to be resolved separately.

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[1]Several of the plaintiffs first commenced this action *pro se* on March 7, 2007 under Docket No. 07-CV-2823.

**NOW, THEREFORE,** without any admission or concession by plaintiffs of any lack of merit of the action whatsoever, and without any admission or concession of any liability or wrongdoing or lack of merit in their defenses whatsoever by defendants,

**IT IS HEREBY AGREED**, by and among the parties as represented below, as follows:

## I. DEFINITIONS

1. The definitions set forth below shall apply through this Stipulation and Order of Settlement ("Stipulation"), unless otherwise indicated:

The following terms used herein shall have the following meaning:

a. "Defendants" shall mean all named defendants.

b. "DOC" shall mean the New York City Department of Correction.

c. "DOHMH" shall mean the New York City Department of Health and Mental Hygiene.

d. "ADA" shall mean the Americans with Disabilities Act and any regulations promulgated thereunder.

e. "NIC" shall mean the Northern Infirmary Command facility at Rikers Island.

f. "Dorm 3" shall mean Dorm 3 located in the NIC. Dorm 3 houses male inmates in DOC's custody who, in the opinion of medical professionals, are disabled and may in some instances require medical services (that do not rise to level of infirmary care) or other assistance with their daily living needs. This stipulation applies only to areas at NIC located in Dorm 3 or any replacement facility for NIC, unless other areas of NIC are specifically identified.

g. "Dorm 4" shall mean Dorm 4 located in the NIC.

h. "Settled Claims" means any and all claims for injunctive relief (i) that have been asserted in the Complaint on behalf of the Class against any of the Defendants or (ii) that could have been asserted for injunctive relief in any forum by the Named Plaintiffs or Class Members on behalf of the Class against any of the Defendants which arise out of, relate to, or are based upon the allegations, transactions, facts, matters or occurrences, representations or omissions involved, set forth, or referred to in the Complaint.

## II. CLASS CERTIFICATION

2. As certified by the Court in the separate Order for Class Certification, dated January 30, 2009 ("Order for Class Certification"), the Class has been certified as follows:

All persons in DOC's custody who are "qualified individuals" with "disabilities," as those terms are defined in the ADA, who are now or who will in the future be housed in Dorm 3 or any replacement facility for Dorm 3 and who may need medical services (that do not rise to level of infirmary care) and/or other assistance with their daily living needs.

3. As ordered by the Court in the separate Order for Class Certification, for the purposes of settlement, Class Counsel is Amy E. Howlett, ESQ., 125 Broad Street, New York, New York, 10004.

## III. DEFENDANTS' COMMITMENTS

**Construction Projects**

4. Bathroom access: DOC shall improve accessibility in the NIC bathroom facilities, Dorms 3 and 4. DOC shall complete construction in the Dorm 3 and Dorm 4 bathrooms by March 2009. All improvements shall comply with the ADA, including but not limited to, properly sized grab bars, located at appropriate heights from the floor in the toilet and

shower areas; wheelchair-accessible shower and toilet stalls that do not contain impediments to access, such as inappropriate or excessive upward slopes; and wheelchair accessible sinks. DOC shall maintain the Dorm 3 and Dorm 4 bathrooms in compliance with the ADA.

5. DOC shall wrap all Dorm 3 sink pipes with protective insulation to protect inmates. DOC shall complete this by March 2009.

6. Dorm 3 Sub-Floor Space: DOC shall permanently fill and seal the sub-floor space in Dorm 3 to achieve one smooth continuous floor free from permanently affixed trip hazards. DOC shall complete this project by March 2009.

7. Meal access: During all meal times, DOC shall provide a wheelchair food tray for each wheelchair-utilizing individual housed in Dorm 3 who requests such a tray to assist in meal provision. DOC shall permanently maintain a working wheelchair-accessible water fountain for Dorm 3 inmates. In the event the water fountain is temporarily out-of-service, DOC shall provide Dorm 3 inmates with continuous access to clean and sanitary water. DOC shall repair any problems with the water fountain within fifteen (15) days of notice of a problem with the fountain, absent exigent circumstances. DOC shall install and maintain affixed countertops along the wall in or around the day room that are the appropriate height for wheel-chair utilizing inmates. DOC shall maintain the newly installed service window from the day room into the general Dorm area.

8. Library Access: DOC shall provide a duly executed declaration from the DOC Executive Director of Fire Safety or his/her designee, accompanied by photographs of all fire exits in the law library, that the fire exit to the NIC law library is safe and accessible for disabled inmates and that there are proper smoke detectors in the area. DOC shall provide plaintiffs with this declaration by March 2009. The ramp adjacent to the NIC law library shall remain at

an accessible slope. The ramp was recently improved by extending one end of the existing freestanding handrail and adjusting this railing to an accessible height; adding a second handrail on the opposite wall; and providing edge protection along the full length of the open side of the ramp's floor surface. To facilitate library entry for a wheelchair user, a portion of the ramp was decreased five inches in width to increase the adjacent floor space by the library door. DOC shall maintain the library entrance and law library in a manner that complies with the ADA and is safe and accessible for disabled inmates.

9. Roof: DOC shall provide a duly executed declaration from the DOC Deputy Commissioner of Budget and Finance or his/her designee that the Dorm 3 roof is leak-free until such time that this settlement is signed and is currently in good and safe condition, is structurally sound, and does not require repair or replacement. DOC shall provide plaintiffs with this declaration by March 2009.

10. Construction Completion: By March 2009, DOC shall provide plaintiffs with written certification that the construction projects set forth in ¶¶ 4-9 above have been completed, accompanied by a duly executed declaration signed by the DOC Deputy Commissioner of Budget and Finance stating that the construction projects comply with this settlement agreement, as well as photographs or measurements.

**Environmental Issues**

11. Pest Control: DOC shall continue to ensure that current routine cleaning practices and protocols are carried out and enforced These protocols require, among other things, that an exterminator service Dorm 3 at least one time per week and take all necessary measures, consistent with inmates' health and safety, to eliminate vermin and insect infestation. DOC shall

ensure that all window screens and door sweeps are and remain in place and that all window screens are free from holes and remain free from holes.

12. Cleanliness: DOC shall continue to ensure that Dorm 3 is properly cleaned and sanitized on a daily basis and that all medical and hazardous waste is safely and properly disposed of on a daily basis, including the removal from Dorm 3 of medical and hazardous waste by the civilian institutional aides hired to service all of the NIC dorms. DOC shall establish and implement a training protocol for inmates who are assigned to assist in cleaning and maintaining sanitation in Dorm 3. DOC shall provide plaintiffs with this protocol by March 2009. Cleaning and sanitation tasks shall not be dependent on the help of disabled inmates. DOC shall maintain, implement, and follow protocols and procedures for cleaning and sanitizing all areas of Dorm 3, as well as for disposing of medical and hazardous waste. DOC shall provide plaintiffs with this protocol by March 2009.

**Safety Improvements**

13. Showers: DOC shall establish and maintain a command level order that requires shower mats are made available before each shower taken by an inmate. DOC shall provide plaintiffs with a copy of the command level order when it is finalized, but no later than March 2009. DOC shall follow this command level order and shall provide a supply of shower mats sufficient to carry out and comply with this command level order. DOC shall continue to maintain and implement a protocol that requires the daily cleaning and sanitizing of the shower mats in the bathroom area and the floor area beneath the mats. DOC shall establish and implement a protocol that requires Inmate Assistants, *see infra* ¶ 15, to be trained to assist visually impaired and wheel-chair utilizing inmates in placing a shower mat on the floor of a selected shower area immediately prior to that inmate's use of the shower area. DOC shall

provide plaintiffs with a copy of the shower mat protocol when it is finalized, but no later than March 2009. DOC shall provide and maintain one shower chair in Dorm 3's punitive segregation area, and one shower chair in each of the other three Dorm 3 wheelchair accessible showers. The shower chairs shall be proper and safe shower chairs manufactured specifically for medical purposes and for use by disabled individuals in the shower. At all times, the shower chairs shall remain in the immediate proximity of above-designated shower areas including three individual stalls and the communal shower area with four showers in an open wheelchair accessible area. DOC shall establish and implement a protocol that requires Inmate Assistants, *see infra* ¶ 15, to be trained to assist visually impaired and wheel-chair utilizing inmates in placing a shower chair inside a selected shower area immediately prior to that inmate's use of the shower area. DOC shall provide plaintiffs with a copy of the shower-chair protocol when it is finalized, but no later than March 2009.

14. Beds: DOC shall obtain twelve (12) medical beds with safety bars for use in Dorm 3 by December 2009. DOC shall provide plaintiffs with certification that the beds have been purchased as well as a detailed description of the beds or photographs of the beds by December 2009.

**DOC To Employ Inmate Assistants in Dorm 3**

15. DOC shall employ non-disabled inmates to assist disabled inmates in Dorm 3 with their daily living needs. Such inmate assistants are hereinafter referred to as "Inmate Assistants." DOC shall provide no fewer than two (2) Inmate Assistants to be on duty at any one time between the hours 7:00 a.m. to 11:00 p.m., and shall provide no fewer than one (1) Inmate Assistant to be on duty between the hours of 11:00 p.m. to 7:00 a.m. If additional Inmate Assistants are needed, DOC shall provide additional assistants accordingly. DOC shall ensure

that Inmate Assistants receive proper training and are clearly informed of their responsibilities and duties. This training will include instruction with respect to privacy and confidentiality issues that may arise during the course of an inmate assistant's reading the sensitive legal material for a visually impaired inmate, and instruction with respect to disciplinary action that will result if an inmate assistant retaliates or punishes a visually impaired inmate based on the discovery of personal information. DOC shall draft, implement, and maintain a command level order that fully describes the responsibilities and duties of Inmate Assistants, including disciplinary procedures for Inmate Assistants who fail to properly perform their duties and responsibilities. DOC shall have these Inmate Assistants in place no later than March 2009. DOC shall provide plaintiffs' counsel with orientation materials and protocols, including disciplinary procedures, for staff and inmates regarding Inmate Assistant duties and responsibilities by March 2009. Inmate Assistants shall provide Dorm 3 inmates with general, non-medical assistance with their daily living needs, including, but not limited to, the following type of assistance: pushing wheel chairs for inmates who are unable to propel themselves, carrying food trays, guiding visually impaired inmates, and reading and writing letters for visually impaired inmates who need such assistance and for other disabled inmates who are unable to read letters and unable to write letters.

**Health Care**

16. DOC and DOHMH shall each follow their respective existing protocols and policies concerning medical need-assessment protocols as well as related disciplinary policies and procedures. DOC shall ensure that all correction staff are aware of said protocols and procedures and related disciplinary procedures. DOHMH shall ensure that all clinical staff

involved in making relevant medical need-assessments are aware of said protocols and procedures and related disciplinary procedures. DOC and DOHMH shall provide plaintiffs' counsel with all such protocols and procedures by March 2009.

**Assistance For The Visually Impaired**

17. Para-Transit Van Restraints: DOC shall ensure that all visually impaired inmates are transported in a safe manner consistent with the mandates of the ADA. By December 2008, DOC shall provide and maintain at least one combination lap/shoulder restraint seatbelt in each DOC para-transit van. By March 2009, DOC shall provide plaintiffs' counsel with (1) manufacturer information, if any, about the lap/shoulder restraints, and (2) photographs of the newly installed lap/shoulder restraints, and (3) a declaration stating that transporting visually impaired persons using the lap/shoulder restraints is safe. Absent exigent circumstances, visually impaired inmates shall be transported only in these para-transit vans and using the above-described restraint seatbelts.

18. Canes: City defendants shall make available, as appropriate, long and/or adjustable canes for inmates who are better accommodated with such canes than with shorter canes.

19. Reading and writing assistance: DOC shall make available for use magnifying sheets for enlarging print in the law library. Magnifying sheets shall also be available in the officer's station in Dorm 3. Inmates will be required to sign in and out for their usage. DOC shall make available at least one (1) Perkins Brailler for use in the law library as well as in the main Dorm 3 area in the event the law library is closed when the Perkins Brailler is requested for use. Inmates will be required to sign in and out for their usage. DOC shall provide additional Braille literary resources, to the extent commercially available, consistent with the number of

visually impaired inmates housed in Dorm 3, such as new books and/or magazines on audio tape and newspapers in Braille. DOC shall ensure, to the extent commercially available and not financially burdensome, that visually impaired inmates have access to the same type and quantity of literary resources provided to non-visually impaired inmates. DOC shall ensure that there is a sufficient supply of Braille paper and appropriately-sized envelopes available for inmate use in the law library as well as in the main Dorm 3 area in the event the law library is closed when the paper or envelopes are requested for use. In the event of an unanticipated surge/increase in the population of visually impaired inmates in Dorm 3, DOC shall increase, as reasonably necessary to maintain an approximate proportionality of visually impaired inmates to supplies, the supply of magnifying sheets, Perkins Braillers, Braille paper, envelopes, and literary supplies as necessary to reasonably accommodate visually impaired inmates' access to the same type of materials as non-visually impaired inmates consistent with the ADA.

20. U.S. Mail: DOC shall implement and follow procedures so that inmates who are eligible for Federal postage benefits—as described in United States Postal Service Publication 347: Free Matter for the Blind and Visually Handicapped Persons—are able to take advantage of such benefits while in DOC custody. DOC shall ensure that DOC employees are trained, to the extent necessary, about the new procedures and are properly disciplined for non-compliance, if any, with the procedures. DOC shall provide plaintiffs' counsel with a copy of these procedures by March 2009.

**Medical Devices**

21. Defendants shall ensure that all Dorm 3 inmates have access to appropriate and safe medical devices. Where the use of specific medical devices are contradicted for security concerns, alternatives shall be considered so that the needs of the inmate are met. DOC shall

ensure that no DOC employee shall seize medical devices from an inmate unless a supervisor determines that a seizure is necessary for a legitimate security purpose, or, an emergency situation arises that justifies seizure by a correction officer. If a correction officer seizes a medical device in an emergency situation, the medical device shall be returned to the inmate within forty-eight (48) hours unless a supervisor approves the continued seizure for a legitimate security purpose. Correctional Health Services Program may remove a medical device from a patient only when a physician or physician's assistant determines that it is not appropriate or that another device would be more appropriate.

## IV. JURISDICTION

22. The provisions of this Stipulation shall not take effect unless and until the Court issues an order approving this Stipulation, at which time this Stipulation will become effective and plaintiffs' injunctive and class-action claims shall be dismissed with prejudice, except that this Court shall retain jurisdiction to enforce this Stipulation for two (2) years after the Court approves the Stipulation, unless, prior to the expiration of that two-year period, upon motion of any party or intervener the Court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of a Federal right. If the Court makes such findings, the Court may continue the Stipulation Period beyond the initial two (2) years as it deems appropriate, subject to the provisions of the PLRA, to allow Defendants reasonable time to remedy any continuing violation.

## IV. DISPUTE RESOLUTION

23. The undersigned parties agree that , in the event that a dispute arises as to whether any party is in compliance with the terms of this Stipulation, the parties shall proceed as follows:

24. Both parties shall make a good-faith effort to resolve any differences which may arise between them over such terms. Prior to the institution of any motion or proceeding, as set forth below, before this Court to enforce the provisions of this Stipulation, Class Counsel shall notify Defendants' counsel in writing of any claim by plaintiffs that Defendants are in violation of any provision thereof. However, where Class Counsel asserts a claim that involves a threat to the immediate physical well-being of any member of the plaintiff class, plaintiffs shall have due recourse to the Court within twenty-four (24) hours of notification to Defendants' counsel of such claims. The parties agree that all disputes concerning compliance and any motions or applications to the Court concerning compliance and enforcement of this Stipulation shall be undertaken through Class Counsel. Any such motion shall be limited to a claim of systemic non-compliance and not be about isolated or sporadic incidents. Prior to bringing any such motion, the party will be required to make reasonable efforts to resolve the dispute with the other party. In the event such reasonable efforts fail to resolve the dispute, the party shall serve written notice on the other party of any claim of non-compliance and the other party will have thirty (30) days from date of service of the written notice of non-compliance in which to respond to the claim of non-compliance. If the matter is not resolved during the thirty (30) day period, then the party may serve upon the other party, a notice of intent to file a motion with this Court alleging a claim of non-compliance. No such motion shall be filed until at least ten (10) business days from the date of service of the notice of intent. Any motion shall detail any and all such efforts to resolve the dispute prior to seeking Court intervention. The time periods set forth in this paragraph may be extended by mutual written agreement of the parties.

**ATTORNEYS' FEES AND COSTS**

25. Plaintiffs agree not to seek attorneys' fees incurred in connection with the injunctive claims alleged in the Complaint and waive any such claims. Plaintiffs also agree not to seek attorneys' fees incurred with respect to the individual damage claims up through the date of the execution of this Stipulation and waive any such claims. Plaintiffs will be entitled to reasonable attorneys' fees and reimbursement of expenses for time spent, if any, enforcing the terms of the Stipulation as set forth in Paragraphs 23 and 24 only if the court grants their motion rendering them prevailing parties. Plaintiffs' counsel will submit any request to defendants' counsel for these fees no later than 60 days after the Court grants their motion rendering them prevailing parties. If counsel cannot agree within ninety (90) days of plaintiffs' request for fees, plaintiffs' counsel will apply to the Court for an award of attorneys' fees and reimbursement of expenses.

**EFFECTIVE DATE OF SETTLEMENT, WAIVER OR TERMINATION**

26. The "Effective Date" of the Settlement shall be the date when all the following shall have occurred:

a. Approval by the Court of the Settlement, following notice to the Class and a hearing, as prescribed by Rule 23 of the Federal Rules of Civil Procedure;

b. The expiration of the 90-day period after notice is provided to the appropriate State and Federal authorities pursuant to the Class Action Fairness Act 28 U.S.C. § 1517; and

c. Entry by the Court of the Order and Final Judgment pursuant to Rules 23 and 54, substantially in the form set forth in Exhibit A annexed hereto, or, in the event that the Court enters an order and final judgment in a form other than the Order and Final Judgment ("Alternative Judgment") and none of the Parties hereto elect to terminate the Settlement, the date of entry of such Alternative Judgment.

27. Defendants or Plaintiffs' Counsel shall have the right to terminate the Settlement and this Stipulation by providing written notice of their election to do so to all other Parties hereto within thirty (30) days of: (i) the Court's declining to enter the Stipulation and Order for Notice to the Class in any material respect; (ii) the Court's refusal to approve this Stipulation or any material part of it; or (iii) the Court's declining to enter the Order and Final Judgment or Alternative Judgment in any material respect.

28. In the event of appeal or anticipated appeal of the Court's final approval of the Settlement, Defendants' Counsel or Plaintiffs' Counsel may seek to stay the Effective Date of the Settlement.

29. Except as otherwise provided herein, in the event the Settlement is terminated, reversed, or fails to become effective for any reason, then the Parties to this Stipulation shall be deemed to have reverted to their respective positions in the Action immediately prior to the execution of this Stipulation and, except as otherwise expressly provided, the Parties shall proceed in all respects as if this Stipulation and any related orders had not been entered.

## V. GENERAL PROVISIONS

30. Plaintiffs agree that the Settled Claims include any and all claims for injunctive relief (i) that have been asserted in the Complaint on behalf of the Class against any of the Defendants, or (ii) that could have been asserted for injunctive relief in any forum by the Named Plaintiffs or Class Members on behalf of the Class against any of the Defendants which arise out of, relate to, or are based upon the allegations, transactions, facts, matters or occurrences, representations or omissions involved, set forth, or referred to in the Complaint.

31. Nothing contained herein shall be deemed to be an admission by Defendants or any of their officials, employees, agents or representatives that they have in any manner or way violated any of plaintiffs' rights, or the rights of any other person or entity, as defined in the constitutions, statutes, ordinances, rules or regulations of the United States, the State of New York, or the City of New York or any other rules, regulations or bylaws of any department or subdivision of the State of New York, or the City of New York.

32. This Stipulation, any action taken to carry out this Stipulation, any negotiations or proceedings related to this Stipulation, and the carrying out and entering into the terms of this Stipulation shall not be construed as, or deemed to be evidence of, an admission or acknowledgement of, or concession with regard to any alleged fault, wrongdoing, culpability, or liability whatsoever by any defendant.

33. This Stipulation shall not have any precedential effect except in an action to enforce its terms.

34. This Stipulation constitutes and contains the entire agreement and contains all the terms and conditions agreed upon between the undersigned parties. No oral agreement entered by the parties at any time or any written agreement entered into between the undersigned parties prior to the execution of this Stipulation regarding the subject matter of the instant proceeding shall be deemed to exist, or to bind the parties hereto, or to vary the terms and conditions contained herein.

35. Each party has cooperated in the drafting and preparation of this Stipulation. Hence, in any construction to be made of this Stipulation, the same shall not be construed against any party on the basis that the party was the drafter. Rather, the language of this Stipulation shall

in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any one of the parties.

Dated: New York, New York
January 29, 2009

Amy Howlett, Esq.
125 Broad Street
33rd Floor
New York, New York 10004
(212) 558-7413

By: ______________________
Amy Howlett (AH 9112)
Attorney for plaintiffs
Class Counsel

New York, New York
January 29, 2009

MICHAEL A. CARDOZO
Corporation Counsel for the City of New York
Attorney for Defendants
100 Church Street, Room 2-194
New York, N.Y. 10007
(212) 788-0878

By: ______________________
Martin Bowe, Esq. (MB 8042)
Senior Counsel

SO ORDERED

Dated: New York, New York
May 7, 2009

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U.S.D.J. Robert P. Patterson